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QUASI IN REM JURISDICTION OVER FOREIGNERS

Quasi in rem jurisdiction has long been a useful weapon in the hands of American plaintiffs suing foreign defendants over whom personal jurisdiction cannot be obtained. The United States Supreme Court's decision in *Shaffer v. Heitner,*[1] which subjected the exercise of quasi in rem jurisdiction to the reasonableness test of *International Shoe Co. v. Washington,*[2] casts doubt as to whether this jurisdictional weapon retains its potency.

This Note will explore the extent to which quasi in rem jurisdiction remains effective in the international setting. First, a general examination will be made of the survival of quasi in rem jurisdiction after *Shaffer*. Second, the focus will narrow to jurisdiction by necessity—a type of quasi in rem jurisdiction that a plaintiff may invoke when no alternative forum is available—and its survival after *Shaffer*. Third, the focus will further narrow to the use of quasi in rem jurisdiction by necessity in international litigation, that is, when only one American forum is available to the plaintiff. Finally, the Note will consider the international implications of continued use of quasi in rem jurisdiction.

I

QUASI IN REM JURISDICTION AFTER *SHAFFER*

Plaintiff Heitner initiated a shareholder's derivative action in Delaware, naming as defendants Greyhound Corporation (a Delaware corporation having its principal place of business in Arizona), a wholly owned subsidiary of Greyhound, and twenty-eight individuals who were present or former officers or directors of one or both of the corporations. The plaintiff alleged that breaches of fiduciary duties by the individual defendants had caused the corporations to violate federal antitrust laws and incur civil and criminal penalties in excess of thirteen million dollars. Neither the plaintiff nor any of the individual defendants were residents of Delaware, and none of the acts complained of by the plaintiff had occurred in Delaware.

Proceeding under a Delaware sequestration statute,[3] Heitner obtained quasi in rem jurisdiction with respect to the individual defendants through

1. 433 U.S. 186 (1977).

2. 326 U.S. 310 (1945). *See* note 7 *infra*.

3. DEL. CODE ANN. tit. 10, § 366(a) (1975). This statute provides for seizure of a nonresident defendant's property to compel the defendant to enter a general appearance in the Delaware courts.

the court-ordered seizure of Greyhound Corporation stock belonging to those defendants.[4] Although none of the stock seized was physically present in Delaware, another statute provided that, for purposes of attachment, Delaware was the situs of all stock in Delaware corporations.[5]

The individual defendants objected to the exercise of quasi in rem jurisdiction on several grounds,[6] one of which was that "under the rule of *International Shoe Co. v. Washington* they did not have sufficient contacts with Delaware to sustain the jurisdiction of that State's courts."[7] The Delaware Supreme Court upheld jurisdiction, summarily dismissing the defendants' jurisdictional objection by deeming the minimum contacts rule of *International Shoe* irrelevant to the exercise of quasi in rem jurisdiction.[8]

The United States Supreme Court reversed. The Court noted that continued adherence to the fiction whereby in rem and quasi in rem actions are deemed to be brought against property rather than against the owners of that property would be fundamentally unfair to defendants.[9] Because the "interests of persons in a thing" are really at stake in such actions,[10] the Court held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[11]

The Supreme Court's decision in *Shaffer* has been interpreted by many commentators to mean many different things.[12] The decision's aura of

4. The stock belonging to the individual defendants that was seized pursuant to the statute was worth approximately $1.2 million. 433 U.S. at 192 n.7.

5. DEL. CODE ANN. tit. 8, § 169 (1975). This statute was subsequently held to be unconstitutional. United States Indus., Inc. v. Gregg, 540 F.2d 142 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977).

6. In addition to the objection to jurisdiction that is the basis of the Supreme Court's opinion and that is the focus of this Note, the defendants argued that "the *ex parte* sequestration procedure did not accord them due process of law and that the property seized was not capable of attachment in Delaware." 433 U.S. at 193.

7. *Id.* (citation omitted). The language of *International Shoe* usually quoted as its rule is that

> due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

326 U.S. at 316 (citation omitted).

8. Greyhound Corp. v. Heitner, 361 A.2d 225, 229, 235-36 (Del. 1976).

9. 433 U.S. at 212.

10. *Id.* at 207. The Court quoted this language from the Introductory Note to RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 (1971).

11. 433 U.S. at 212 (footnote omitted). The progeny of *International Shoe* are those cases following it that developed its rule, *see* note 7 *supra,* into the reasonableness standard applied by the Court in *Shaffer. See, e.g.,* McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

12. A flood of writing has followed the *Shaffer* decision. Cited here are a few examples that bear on some of the ideas discussed in this Note. *See, e.g.,* Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdiction Theory?,* 26 KANSAS L. REV. 61 (1977); Fischer, *"Minimum Contacts": Shaffer's Unified Jurisdictional Test,* 12 VAL. U.L. REV. 25 (1977); Leathers, *Sub-*

progressiveness[13] masks numerous unexplained complexities,[14] which only closer inspection reveals and only future litigation will resolve. Nonetheless, *Shaffer* indisputably accomplished one thing: it set aside the long-standing rule that a state can always exercise jurisdiction solely because of its power over property within its borders. Exercises of quasi in rem jurisdiction must now be scrutinized under the reasonableness test of *International Shoe* and its progeny.

The Court's holding in *Shaffer* does not mean, however, that quasi in rem jurisdiction no longer exists. The Court suggested several circumstances in which quasi in rem jurisdiction may still be maintained successfully. First, quasi in rem jurisdiction may be reasonable when the plaintiff seeks to assert a pre-existing interest in the property attached. In such a situation the property itself is the source of the controversy, thereby usually

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stantive Due Process Controls of Quasi In Rem *Jurisdiction,* 66 KY. L.J. 1 (1978); Olsen, Shaffer v. Heitner: *A Survey of Its Effects on Washington Jurisdiction,* 13 GONZ. L. REV. 72 (1977); *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 152-62 (1977); 32 ARK. L. REV. 101 (1978); 30 BAYLOR L. REV. 183 (1978); 11 CREIGHTON L. REV. 971 (1978); 46 FORDHAM L. REV. 459 (1977); 63 IOWA L. REV. 504 (1977); 11 LOY. L.A.L. REV. 87 (1977); 57 NEB. L. REV. 523 (1978); 13 TULSA L.J. 82 (1977); 1977 UTAH L. REV. 361; 14 WAKE FOREST L. REV. 51 (1978); 35 WASH. & LEE L. REV. 131 (1978); 53 WASH. L. REV. 537 (1978).

13. Many commentators have long suggested that the power theory of jurisdiction is outmoded and that all exercises of jurisdiction should instead be subject to a reasonableness standard. *See, e.g.,* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1176-79 (1966); Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?,* 49 ST. JOHN'S L. REV. 668 (1975).

14. For a good discussion of the complexities that the Supreme Court either created or left unresolved, see Casad, *supra* note 12, at 72-77. One of the ambiguities of the decision is whether a reasonableness test has supplanted the old power test or whether jurisdiction must now satisfy both a power (minimum contacts) test and a reasonableness test in order to be constitutionally permissible. This question is of critical importance to the exercise of personal jurisdiction. But it is not pertinent here, because the presence of the property that serves as the basis for quasi in rem jurisdiction satisfies any power test. Hence, this Note may safely treat *Shaffer* as simply applying the reasonableness test to quasi in rem jurisdiction.

The Supreme Court does not distinguish in its decisions between the concepts of minimum contacts and reasonableness, but rather uses them interchangeably. The terminology used in this Note—a power test (equated with minimum contacts) as distinct from a reasonableness test—is not of general applicability. It is derived from analysis of the outcome of the Supreme Court's decisions rather than from the language they employ. For example, in the recent case of Kulko v. Superior Court, 98 S. Ct. 1690 (1978) (an action by a California wife to establish a foreign divorce decree as a California judgment against a New York husband, to obtain full custody of the children, and to increase an order for child support), the Court said that "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application." *Id.* at 1697. The Court focused on the conduct of the defendant, a resident of New York, in relation to California, looking for "affiliating circumstances." *Id.* This suggests that the Court, although couching its decision in terms of reasonableness, used more of a power, or minimum contacts, test. The Court looked at the interests of the plaintiff and the state, which would be relevant in a reasonableness test, but found them to be weak. *Id.* at 1700-01. The question left by the case is whether the result would have been different if the conduct of the defendant was the same but the interests of the plaintiff and the state were stronger. If the outcome would be different, then it would suggest that the court was using a reasonableness test rather than a power test.

making it reasonable to exercise quasi in rem jurisdiction with respect to that property.[15] Second, quasi in rem jurisdiction may be sustained when the plaintiff wishes to freeze the defendant's property not as a jurisdictional basis, but as security for a judgment being sought in a forum that can constitutionally exercise personal jurisdiction over the defendant.[16] Third, in a forum in which personal jurisdiction over the defendant would be constitutionally permissible, quasi in rem jurisdiction may be available to the plaintiff who wishes to use the defendant's property to satisfy a claim even though it is unrelated to the property.[17] These three types of quasi in rem jurisdiction will be of continued interest to American plaintiffs suing foreign defendants; but by their very nature they are of limited applicability and appeal.[18] Of broader interest and greater utility to American plaintiffs in international litigation, and of central concern to this Note, is a fourth possible remnant of quasi in rem jurisdiction: jurisdiction by necessity.[19]

Consider the following situation. An American plaintiff desires to sue a foreign defendant. The prospective defendant does not have sufficient contacts with the United States to make it reasonable to subject him to personal jurisdiction anywhere in this country. The defendant does, however,

15. 433 U.S. at 207. This is the first of the two types of quasi in rem jurisdiction, which the Court described in footnote 17, *id.* at 199 (quoting Hanson v. Denckla, 357 U.S. 235 (1958)). A mortgage foreclosure is a typical example of this kind of quasi in rem jurisdiction. The Court set out several reasons why the state should have jurisdiction in this situation: (1) to meet the property owner's expectation that the state will protect his interests; (2) to assure the marketability of property located within the state; (3) to assure the resolution of disputes involving that property; and (4) to most conveniently use the important records and witnesses that would most likely be found in the state. *Id.* at 208.

16. *Id.* at 210. For a recent case after *Shaffer* supporting this kind of quasi in rem jurisdiction, see Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977). In that case, the garnishment in California of a debt owed to the defendant by a California corporation was held to be valid as security for a possible award in an arbitration proceeding in New York. Although there were insufficient contacts to support personal jurisdiction over the defendant in California, *id.* at 1046, the court held that there were enough contacts to give it the limited jurisdiction needed to order the garnishment, *id.* at 1048.

17. 433 U.S. at 208. This is the second of the two types of quasi in rem jurisdiction. *See id.* at 199 n.17 (quoting Hanson v. Denckla, 357 U.S. 235 (1958)). The Court gave as an example of this type "suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership." *Id.* at 208 (footnote omitted). That is to say, if a state had a long-arm statute that reached to the constitutional limits of jurisdiction, the exercise of personal jurisdiction thereunder would be constitutionally permissible; but the state might instead choose to limit the plaintiff's assertion of jurisdiction to quasi in rem. *Id.* at 208 n.29.

18. For examples of situations in which these three types of quasi in rem jurisdiction will be of continued interest and use to American plaintiffs, see notes 15-17 *supra*.

19. The survival of this type was suggested by the Court when it said:

> This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff.

Id. at 211 n.37. *See also* Casad, *supra* note 12, at 76-77; *The Supreme Court, 1976 Term, supra* note 12, at 162.

have property in the United States, but it bears no relation to the plaintiff's claim. In the absence of an alternative American forum, should the plaintiff be allowed to assert quasi in rem jurisdiction based solely on the presence of the defendant's property in the forum?

II

JURISDICTION BY NECESSITY IN DOMESTIC LITIGATION

A. THE BASIC THEORY

Reasonableness is thus a standard by which all assertions of jurisdiction are to be measured after *Shaffer*.[20] Implicit in any reasonableness test is a balancing process,[21] which takes into consideration the relevant competing interests—those of the defendant, the plaintiff, and the state.[22]

Fairness and convenience are the primary interests of the defendant. As a result, he will often strongly oppose having to defend a claim away from his home forum. If the defendant is required to do so without sufficient reason, his sense of justice in the litigation process will be offended. When determining whether jurisdiction should be sustained in a particular situation, courts' decisions have reflected the traditional bias in favor of the defendant. The defendant's interests will therefore be dominant unless justification exists for compelling him to litigate in the forum chosen by the plaintiff.[23]

The plaintiff's principal interest is to satisfy his claim against the defendant. He has a strong interest in being heard in the forum of his choosing, which will be that which is most convenient for him. Most often this will mean that the plaintiff will prefer to sue in his home forum.[24]

A state has an interest in providing a forum where disputes involving property within its borders can be resolved[25] and where its citizens can pur-

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20. *See* note 11 *supra* and accompanying text.

21. Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of* Pennoyer v. Neff, 43 BROOKLYN L. REV. 600, 607 (1977).

22. "It is by no means settled which factors are to be considered relevant in this context." *Id.* The value of so limiting the analysis to these three interests, however, is that they reflect "the primary concern of rules of adjudicatory authority." *Id.* at 608.

23. "[A]n essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State." Kulko v. Superior Court, 98 S. Ct. 1690, 1697 (1978) (citations omitted). Because the plaintiff is the one "who . . . acts contrary to the social policy that discourages litigation," he normally has the burden of pursuing the defendant at the defendant's home. Smit, *supra* note 21, at 608; von Mehren & Trautman, *supra* note 13, at 1127, 1173. This remains true even though the increased mobility of modern society has made it easier for the defendant to defend in a court away from home.

24. Smit, *supra* note 21, at 608.

25. 433 U.S. at 208.

sue their claims.[26] Legislative evidence of a state's concern in particular areas of law will make the state's interest a stronger factor in determining the reasonableness of jurisdiction.[27] When a state is the only adequate forum available to the plaintiff, its interest is greatly strengthened in favor of sustaining jurisdiction to avoid the socially unsatisfactory result of allowing the controversy to remain unheard altogether.[28]

The interests of the plaintiff and the state will usually coincide.[29] The plaintiff has a strong interest in finding a forum in which to assert his claim, and the state normally wants to provide the plaintiff with that forum. Although the state's interest in providing a forum will weaken if the plaintiff is not a local resident or if there is another forum open to him,[30] when only one forum is available to the plaintiff—the situation posited by this Note—the state's interests will usually support jurisdiction.

Against the unavailability of an alternative forum for the plaintiff, a court should balance the "extent [to which] the defendant will be disadvantaged by being sued at the [plaintiff's] forum rather than at his home."[31] The importance of providing a forum for the plaintiff in these circumstances may prevail, even though the unfairness to the defendant might otherwise justify the court's declining jurisdiction. Nonetheless, the availability of jurisdiction by necessity is not a foregone conclusion every time only one forum is open to a plaintiff. In each case, the court must still balance the competing interests to determine whether the defendant may reasonably be required to travel to the forum selected by the plaintiff to defend the action. If this burden may reasonably be imposed upon the defendant, then jurisdiction by necessity will lie.

B. *MULLANE:* AN ILLUSTRATION OF JURISDICTION BY NECESSITY

A prototype situation of jurisdiction by necessity in which there were "compelling reasons for providing a forum"[32] is *Mullane v. Central Hanover Bank & Trust Co.*[33] In that case, the trustee of a New York common trust

26. Smit, *supra* note 21, at 608-09.

27. The plaintiff in *Shaffer* had unsuccessfully argued that Delaware had strong interests in supervising the control and management of corporations incorporated under Delaware law. The Court did not find such a compelling interest. "Delaware law basis [*sic*] jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State." 433 U.S. at 214. This suggests that to be a strong factor in the finding of jurisdiction the state should have expressed an explicit interest in a certain area of law. Codification would express such a strong interest.

28. Zammit, *supra* note 13, at 682; 46 FORDHAM L. REV. 459, 476-77 (1977).

29. Smit, *supra* note 21, at 611-12.

30. *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 965 (1960); 46 FORDHAM L. REV. 459, 477 (1977).

31. Smit, *supra* note 21, at 611.

32. Von Mehren & Trautman, *supra* note 13, at 1174.

33. 339 U.S. 306 (1950).

fund brought an action in New York for a judicial settlement of account. The action was not a proceeding in rem or quasi in rem, since it involved the adjudication and termination of personal rights of the trust beneficiaries rather than just the determination of title to the trust.[34] The action thus seemed to require the court to exercise personal jurisdiction over the beneficiaries. But upon objection to jurisdiction because some of the nonresident beneficiaries had not been personally served, the Supreme Court held that under the circumstances of that case the historical distinctions between in rem, quasi in rem, and in personam jurisdiction were not useful or necessary. It was

> sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of [the] state in providing [a forum] . . . is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.[35]

The large number of beneficiaries who were residents of other states meant that no one court could obtain personal jurisdiction over all of them and that New York was therefore the only adequate forum available to the plaintiff. In determining whether the New York court should have taken jurisdiction to settle the account, the Supreme Court weighed the interests of the parties and of the state. The interests of the individual beneficiaries were notice and opportunity to be heard as guaranteed by the fourteenth amendment.[36] The plaintiff trustee's interest was to find a forum in which to determine conclusively his personal liability for any alleged mismanagement of the trust.[37] The state had a "vital interest . . . in bringing any issues as to its fiduciaries to a final settlement," a goal that could only be accomplished "if interests or claims of individuals who [were] outside of the State [could] somehow be determined."[38] On the one hand, the action would deprive the nonresident beneficiaries of certain property rights.[39] But on the other hand, the beneficiaries would receive adequate notice and an opportunity to be heard before any such deprivation took place, and no

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34. The personal obligation of the trustee, to be determined in the settlement of the account, cannot serve as the requisite res for an in rem action. Fraser, *Jurisdiction by Necessity—An Analysis of the* Mullane *Case*, 100 U. PA. L. REV. 305, 309 (1951).

35. 339 U.S. at 313.

36. *Id.* at 314.

37. *Id.* at 311.

38. *Id.* at 313.

39. The Court described the two ways that property rights of the beneficiaries might be terminated:

> It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest.

Id.

affirmative personal liability would be imposed upon them.[40] The Court thus concluded that jurisdiction should be upheld, because the necessity that New York be able judicially to settle accounts established under its laws made jurisdiction over the nonresident beneficiaries reasonable.[41]

C. SURVIVAL OF QUASI IN REM JURISDICTION BY NECESSITY IN *SHAFFER*

Jurisdiction by necessity has thus far been considered either in terms of personal jurisdiction or, as in *Mullane,* in terms of a type not classified as personal, in rem, or quasi in rem. Quasi in rem jurisdiction after *Shaffer* may be of special utility in either of two situations to plaintiffs who have only one forum in which to sue a defendant. In the first situation, the defendant has property in the forum as well as certain "minimum contacts" with that forum. The state may, however, have a restrictive long-arm statute, which means that such a defendant will not always be subject to the exercise of personal jurisdiction.[42] A state with such a restrictive long-arm statute has chosen not to exercise its full jurisdictional powers with respect to personal jurisdiction, thereby creating a gap between the reach of the long-arm statute and the constitutional limits of jurisdiction. But the plain-

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40. Suggesting that the personal rights at stake were limited, the Court said that the jurisdiction to be asserted had "some characteristics and is wanting in some features of proceedings both *in rem* and *in personam.*" *Id.* at 312.

41. *See* Fraser, *supra* note 34, at 311.

42. An example of such a restrictive long-arm statute is that which is applied in New York:

> (a) . . . As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
> 1. transacts any business within the state; or
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
> 4. owns, uses or possesses any real property situated within the state.
> . . . .
> (c) Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

N.Y. CIV. PRAC. LAW & R. § 302 (McKinney 1972 & Supp. 1977). By contrast, California has a nonrestrictive long-arm statute:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

CAL. CIV. PROC. CODE § 410.10 (West 1973).

tiff may still be able constitutionally to assert jurisdiction within that gap by proceeding under the state's attachment statute.[43] That quasi in rem jurisdiction survives *Shaffer* in this situation is not especially surprising. It will be of limited use, however, helping only the plaintiff who is suing in a state that has a restrictive long-arm statute.

Quasi in rem jurisdiction may be of much greater utility in a second situation. The defendant here has property in the only forum available to the plaintiff, but the property is unrelated to the plaintiff's claim and the defendant has no other contacts with that forum. The sole premise for jurisdiction is thus the presence of the defendant's property.[44] Quasi in rem jurisdiction may be used by the plaintiff to reach the defendant in these circumstances even though personal jurisdiction would never be constitutionally permissible.[45] Although this result seems to contradict the otherwise restrictive holding of *Shaffer,* the two can be reconciled upon closer inspection. The Supreme Court itself suggested this possible exercise of quasi in rem jurisdiction in a footnote to the *Shaffer* opinion when it excluded cases of quasi in rem jurisdiction by necessity from the scope of its decision.[46]

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43. The consensus of the commentators on *Shaffer, see* note 12 *supra,* is that there is now a single uniform standard of reasonableness for all exercises of jurisdiction, and thus one constitutional boundary for personal as well as quasi in rem jurisdiction. Commentators have also suggested that this means quasi in rem jurisdiction will be of continued utility only in situations in which a state's long-arm statute has not reached to the limits of constitutionally permissible jurisdiction. *But see* text accompanying notes 44-48 *infra.*

44. Should the attachment of the defendant's property itself be one of the contacts when deciding whether the defendant has the minimum contacts needed with the state? In Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017 (2d Cir. 1978), the Second Circuit upheld quasi in rem jurisdiction in New York based on the attachment of a debt owed in New York to the nonresident defendant. The court interpreted *Shaffer* to mean that "the presence of the defendant's property within New York must be viewed as only one contact of the defendant with the state, to be considered along with other contacts . . . ." *Id.* at 1022. Jurisdiction was reasonable because of the " 'substantial connection' of the contract with New York" and "the added factor of the attachment of an intangible within the jurisdiction of the state . . . ." *Id.* at 1023. The Supreme Court in *Shaffer* had said only that "although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction." 433 U.S. at 209. This language seems to indicate that the presence of the property or its attachment might suggest other contacts but is itself a very minor factor, if one at all.

45. This does not mean, however, that quasi in rem jurisdiction extends beyond the constitutional limits of jurisdiction. *See* note 43 *supra*; note 48 *infra.* Rather, in this one particular situation quasi in rem jurisdiction may be reasonable and thus constitutionally permissible even though the exercise of personal jurisdiction, even under a nonrestrictive long-arm statute, would not.

46. *See* note 19 *supra.* Professor Siegel narrowly interpreted this footnote to mean that situations covered by it would not be common "except perhaps in wartime." D. SIEGEL, HANDBOOK ON NEW YORK PRACTICE 125 (1978). Such a narrow interpretation seems unnecessary in light of the analysis in this Note. The majority of the commentators on *Shaffer, see* note 12 *supra,* while agreeing that there is only one reasonableness standard, cite this footnote

A state may have territorial power over the property upon which the plaintiff wishes to base jurisdiction, but *Shaffer* now requires that the exercise of quasi in rem jurisdiction must also be reasonable.[47] When the failure of the state to provide the plaintiff with a forum would leave him without any means to pursue a remedy against the defendant, the "necessity" of providing a forum may make it reasonable for the state to exercise the full extent of its power. Although the state does not have power over the person of the defendant, it does have power over his property. Quasi in rem jurisdiction based solely on the property may therefore be reasonable. This application of quasi in rem jurisdiction after *Shaffer* is subject to one caveat: because such jurisdiction is based wholly on the state's power over the property, to retain its reasonableness any judgment that results from an action based on such jurisdiction must be limited to the value of the property over which the state exercises its power.[48]

III

APPLICATION OF JURISDICTION BY NECESSITY TO INTERNATIONAL LITIGATION

A. The Basic Theory

In the international arena, reasonableness remains the standard by which an American court should determine whether or not to uphold jurisdiction in a particular action. Again implicit in the reasonableness test is a balancing process that takes into account the competing interests of the parties and the state. The theory of jurisdiction by necessity likewise remains fundamentally the same as in purely domestic litigation.[49] The interests of the parties and of the state change slightly, because the plaintiff's "only

as an exception, without explaining the implications of such a departure from the broad scope of the decision.

47. For a discussion of this Note's distinction between power (minimum contacts) and reasonableness, see note 13 *supra*.

48. Logically, it seems that the limited nature of a quasi in rem judgment, at least the limited liability if not also the limited size, is a factor that a court should consider in deciding the reasonableness of any exercise of quasi in rem jurisdiction. Such an analysis would suggest that there are two constitutional standards for the exercise of jurisdiction, with quasi in rem jurisdiction always reaching beyond where personal jurisdiction would be permissible because of its limited nature. But the Supreme Court in *Shaffer* did not agree. 433 U.S. at 207 n.23, 209 n.32. Despite the Court's rejection of this approach, the extraordinary nature of the proposed jurisdiction demands that the judgment be so limited by allowing the defendant to enter a limited appearance.

49. No fundamental distinction needs to be drawn between the jurisdictional problems raised by litigation involving international elements arising in an American court, state or federal, and those raised by litigation in which the nonlocal elements are connected with sister states . . . . [T]he relevant constitutional considerations seem equally applicable to the interstate and the international case.

Von Mehren & Trautman, *supra* note 13, at 1122.

available forum" in domestic litigation is now his only American forum. Because of this change, its effect on the interests to be considered, and the nature of suits involving foreign defendants, the occasions for the use of jurisdiction by necessity in the international setting will be more frequent.

American courts in international litigation will doubtless sympathize with an American plaintiff who is suing a foreign defendant. Nonetheless, American courts should not ignore a foreign defendant's interests solely because of his status as a foreigner. Rather, his status should be weighed along with the other circumstances before the court. Fairness and convenience remain the principal interests of the foreign defendant, which means he will oppose strongly the American plaintiff's attempt to sue him away from his home country. If the foreign defendant is compelled to defend in a U.S. court, he will be more significantly inconvenienced than a domestic defendant, since he will have to travel to a foreign country rather than to a different state. Furthermore, the foreign defendant's sense of fairness and justice will be more easily offended if jurisdiction is exercised without adequate justification in the American forum chosen by the plaintiff: the defendant will not only be required to travel to the United States, but once there he will be subjected to an alien legal system.

An American plaintiff will usually still prefer to have his claim against a foreign defendant heard in the plaintiff's home forum. But because the defendant is not a U.S. resident, the plaintiff will now have an even stronger interest in being able to assert his claim against the defendant somewhere in the United States. The maxim that the plaintiff must normally pursue the defendant still applies to international litigation.[50] Against this rule, however, a court should balance the unfairness and inconvenience of requiring the American plaintiff to leave the country to sue the defendant.[51] If the unfairness and inconvenience to the plaintiff would increase greatly, then the traditional bias in favor of the defendant should weaken accordingly.[52]

When a court is balancing the relative fairness and convenience to the parties to determine whether jurisdiction in the plaintiff's American forum would be reasonable, consideration of the *nature* of the parties' activities is important.[53] If, for example, the foreign defendant's activities are international in nature—that is, the foreign defendant has contacts with more than one country—then his inconvenience in defending a claim in the United

50. M. WOLFF, PRIVATE INTERNATIONAL LAW 62-63 (2d ed. 1950).

51. Smit, *supra* note 21, at 610-11; von Mehren & Trautman, *supra* note 13, at 1172 (suggesting that in international litigation courts should broaden their traditional inquiry into the fairness to the defendant to consider also the fairness to the plaintiff).

52. The Supreme Court in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), believed that the plaintiff insureds would be "at a severe disadvantage if they were forced to [go] to a distant State in order to hold it legally accountable." It is easy to see that this disadvantage would increase if the plaintiff is forced to go to a distant country.

53. Von Mehren & Trautman, *supra* note 13, at 1172.

States will be less. His interest in being sued at home will thus weaken accordingly, especially if the plaintiff's activities are local in nature—that is, they are confined to one state.[54] But if the foreign defendant's activities are localized in his country, the American court may not reasonably be able to require the defendant to defend a claim away from his home, especially if the plaintiff's activities are now international in nature.[55] It follows then that if the plaintiff's activities are international in nature, his interest in being provided with an American forum will weaken, since the inconvenience to him if required to pursue the defendant abroad may be minor, or even nonexistent. When the plaintiff's and the defendant's activities are both localized or both international, the traditional bias in favor of the defendant should again govern the result in the absence of any other justification for disrupting it.[56]

An important corollary to the nature of the parties' activities is the *level* of their activities. It may not be reasonable to assert jurisdiction in the American forum with respect to a small foreign defendant—such as an individual—whereas it may be reasonable if the defendant is large—such as a foreign corporation. Likewise, an individual American plaintiff will usually be more able reasonably to compel the foreign defendant to defend in the American forum than would a large American plaintiff.[57] It is essential, however, that the level of activities always be considered in conjunction with the nature of those activities. For example, a large foreign corporation's business might be conducted totally within its country, whereas an individual foreigner may be a world traveller who has many contacts with the United States.

In international litigation, "[a] country may consider it to be the primary task of its courts to serve its own nationals and not, or only exceptionally, the citizens of foreign states."[58] American plaintiffs suing foreign defendants will, therefore, normally have the sympathies of American courts and the courts will have a strong interest in providing American citizens with a forum.[59] As in all cases of jurisdiction by necessity, this interest should be even stronger if there is only one American court open to the plaintiff.[60]

The possibilities considered thus far have been broadly framed situa-

54. *Id.* at 1170.

55. *Id.*

56. *Id.* The traditional bias should be less strongly grounded if both parties' activities are international.

57. *See* the discussion of Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977), notes 66-75 *infra* and accompanying text.

58. M. WOLFF, PRIVATE INTERNATIONAL LAW 60 (2d ed. 1950).

59. Compare the discussion of Majique Fashions, Ltd. v. Warwick & Co., N.Y.L.J., Aug. 1, 1978, at 5, col. 3 (N.Y. Sup. Ct. Aug. 1, 1978), notes 83-90 *infra* and accompanying text.

60. *See* text accompanying note 30 *supra*.

tions of jurisdiction by necessity. More particularly, the foreign defendant may own property that is located in the United States. If he also has certain minimum contacts with the American forum, but the state has a restrictive long-arm statute, thereby not extending the exercise of personal jurisdiction to the constitutional limits, quasi in rem jurisdiction may still be reasonable.[61] But if the property is the foreign defendant's sole contact with the United States and the plaintiff would have to leave the country to sue the defendant if jurisdiction were denied, the necessity of providing an American plaintiff with an American forum may make it reasonable in certain cases for the American court to assert quasi in rem jurisdiction with respect to the foreign defendant's property.[62]

Because the presence of the foreign defendant's property is the sole basis for quasi in rem jurisdiction by necessity, the relationship between the property and the American forum should be an important factor in the determination of reasonableness. It would most likely not be reasonable to base jurisdiction, even jurisdiction by necessity, on property that is in the forum either fortuitously or transiently. In other words, it should be foreseeable that the defendant's property might be used as a basis for jurisdiction.[63] Moreover, in light of the extraordinary jurisdiction being proposed, any judgment for the American plaintiff should be limited to the value of the property attached.[64]

The possible variations of the parties' interests, of the nature and level of the parties' activities, and of the intensity of the state's interest indicate that the standard of reasonableness in international litigation will not produce a blanket rule that will in turn yield a uniform result on the issue of jurisdiction when the American plaintiff has only one American forum in which to sue the foreign defendant. One thing, however, seems clear, and indeed seems to follow inevitably from a balancing process: there will be cases, after *Shaffer,* when personal jurisdiction by necessity will lie and even more cases when courts may reasonably exercise quasi in rem jurisdiction by necessity, even though the sole basis for jurisdiction is the presence of the foreign defendant's property within the forum. One such case in which the foreign defendant's property alone was enough to form a reasonable basis for the exercise of quasi in rem jurisdiction is *Feder v. Turkish Airlines.*[65]

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61. *See* note 43 *supra* and accompanying text.
62. *See* notes 44-48 *supra* and accompanying text.
63. *See, e.g.,* Feder v. Turkish Airlines, 441 F. Supp. 1273, 1278 (S.D.N.Y. 1977). *See also* note 80 *infra* and accompanying text.
64. *See* text accompanying note 48 *supra.*
65. 441 F. Supp. 1273 (S.D.N.Y. 1977).

B. Application of the Balancing Process

1. Feder v. Turkish Airlines

The executors of the estate of Philip Feder brought a wrongful death action in the United States District Court for the Southern District of New York against Turkish Airlines, a Turkish corporation. The plaintiffs could not obtain personal jurisdiction over the defendant anywhere in the United States.[66] The defendant did, however, have a bank account in New York, and the district court granted an order of attachment[67] for $100,000 for the dual purpose of "security for the plaintiffs' claim and the obtaining of quasi-in-rem jurisdiction in respect of that claim."[68] The defendant objected on the grounds that such jurisdiction was invalid in light of the Supreme Court's decision in *Shaffer*.

Although the assets attached had no relationship to the underlying claim and the defendant had no other contacts with New York, the district court sustained quasi in rem jurisdiction.[69] The court distinguished *Shaffer* by comparing the nature of the defendants' conduct in the two cases. In *Shaffer,* the defendants had "simply . . . nothing to do with" the State of Delaware.[70] By contrast, in *Feder* "[t]he attachment [arose] from a commercial bank account which [the defendant] voluntarily opened in New York for the furtherance of its business."[71] The presence of the bank account in New York was not "unwitting," so the exercise of quasi in rem jurisdiction was reasonable.[72] One of the predictable risks assumed when a

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66. [Turkish Airlines] does not conduct any business activities in the State of New York. THY [Turkish Airlines] has no offices within New York, no employees working or residing within the State, owns or leases no real or personal property within the United States, pays no taxes in the United States, has no flights operating into or out of the state of New York or the United States. Moreover, THY has never qualified to do business in any state of the United States, including New York, and has never applied for a foreign air carrier permit from the Civil Aeronautics Board which would permit THY to fly into the United States.

Affidavit of George N. Tompkins, Jr. in Support of Defendant's Motion to Dismiss, at 2-3, Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (on file at the *Cornell International Law Journal*).

The author would like to thank Paul S. Edelman of the law firm of Kreindler & Kreindler, New York City, who was the attorney for the plaintiffs in *Feder,* for supplying many documents involved in the case and for providing insights into the court's decision in *Feder.*

67. The attachment was authorized under N.Y. Civ. Prac. Law & R. § 6201(1) (McKinney 1963). An order of attachment in New York, N.Y. Civ. Prac. Law & R. § 6211 (McKinney 1963), covers both the attachment of property and the garnishment of debts.

68. Memorandum and Order, at 1, Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (on file at the *Cornell International Law Journal*).

69. This decision was not appealed because the case was settled shortly after the decision was rendered.

70. 441 F. Supp. at 1278.

71. *Id.* at 1279.

72. *Id.* at 1278.

person makes voluntary contacts with a state had "come home to roost."[73]

On the surface, the factual circumstances in *Shaffer* and *Feder* do not differ significantly. From the fact that the two courts nonetheless reached different results, one can infer from the *Feder* holding that the court considered and balanced the relevant interests at stake—a balancing that led the court to conclude that it could reasonably exercise jurisdiction.

Turkish Airlines was a large corporation doing business internationally. It had deliberately opened a bank account in New York in connection with its business. The potential unfairness and inconvenience of requiring it to defend the plaintiff's claim in New York was therefore diminished. The plaintiffs were individuals whose activities were completely local in nature. If jurisdiction in New York had been denied, the plaintiffs would have faced the prohibitive burden of having to leave the country to sue the defendant in Turkey.[74] The plaintiffs' judgment was to be limited to the assets of the bank account attached.[75] These factors, together with the strong public interest of providing an American forum to an individual American plaintiff suing a large foreign corporation made it necessary and, therefore, reasonable to base jurisdiction solely on the foreign defendant's assets within New York.

2. *Reconciling Seemingly Conflicting Results*

In two cases that have been decided since *Feder,* American plaintiffs suing foreign defendants have attempted to premise quasi in rem jurisdiction solely on the presence of the defendants' bank accounts in New York.[76] Although the two cases were factually very similar, the courts reached different results, one court upholding quasi in rem jurisdiction and the other court denying it. Despite these conflicting results, when the balancing analysis developed above[77] is applied to the facts of these cases, it appears that the results may both be correct.

In *Lime International Corp. v. Bank in Liechtenstein Aktiengesellschaft,*[78] a New York corporation sued a Liechtenstein bank to recover on a performance bond. The defendant's only contact with New York was its maintenance of three bank accounts there, which were unrelated to the plaintiff's cause of action. Yet the United States District Court for the

73. *Id.*

74. Affidavit of Paul S. Edelman, Plaintiff's Attorney, at 2a, Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (on file at the *Cornell International Law Journal*).

75. Memorandum and Order, at 2, Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (on file at the *Cornell International Law Journal.*)

76. Lime Int'l Corp. v. Bank in Liechtenstein Aktiengesellschaft, No. 77 Civ. 5499-CSH (S.D.N.Y., Jun. 29, 1978); Majique Fashions, Ltd. v. Warwick & Co., N.Y.L.J., Aug. 1, 1978, at 5, col. 3 (N.Y. Sup. Ct. Aug. 1, 1978).

77. *See* notes 49-65 *supra* and accompanying text.

78. No. 77 Civ. 5499-CSH (S.D.N.Y., Jun. 29, 1978).

Southern District of New York refused to vacate an order of attachment of the bank accounts, stating that "it should come as no surprise to defendant to find whatever property it maintains here subjected to the legal process of our courts."[79] The court found the exercise of quasi in rem jurisdiction to be reasonable, even after *Shaffer,* because it was foreseeable.[80] The district court also weighed the interests of the parties and of the state and refused to dismiss the case on grounds of forum non conveniens because to do so would have "deprive[d] a United States citizen of the recourse available in its own courts."[81] The defendant argued that the action should have been brought where its witnesses resided and where the tangible proof was located; but the court said that such factors were "counterbalanced by the inconvenience such a venue would work on plaintiff, who finds its witnesses and essential documents in New York."[82]

Quasi in rem jurisdiction based solely on the defendant's New York bank account was also asserted in *Majique Fashions, Ltd. v. Warwick & Co.,*[83] but the New York state court declined to sustain such jurisdiction. Although the result of the *Majique Fashions* case may be correct, application of an interest analysis suggests that the court's inquiry and reasoning were incomplete.

The American plaintiff alleged that the defendant, a Hong Kong corporation, had breached a contract that the parties had negotiated and performed entirely in Korea. Since the defendant's bank account had no relationship to the contract, the court held that jurisdiction was not reasonable under *Shaffer's* standards. The court cited *Feder* and a more recent Second Circuit case, *O'Connor v. Lee-Hy Paving Corp.*;[84] but rather than follow *Feder,* the facts of which were virtually identical to those of *Majique*

79. *Id.*

80. The district court interpreted *Shaffer* as speaking in terms of foreseeability. Consequently, the question the court asked in this case was: "[W]ere the defendant-owner's actions in dealing with his property such that he should reasonably have anticipated having to defend it in the attaching forum?" *Id.* The court also cited language from Justice Stevens' concurring opinion in *Shaffer* to the effect that the opening of a bank account in another state necessarily gives rise to predictable risks. *Id.*

81. *Id.* The case is thus an example of an international quasi in rem jurisdiction by necessity case as described above.

82. *Id.* The court, although deciding whether to dismiss the action on forum non conveniens grounds, looked at the same interests that would be relevant in a jurisdictional decision in international litigation. *See* notes 49-65 *supra* and accompanying text. Had there been another forum available in which the plaintiff could have brought his action but in which he would not have been inconvenienced, then the court may have been justified in dismissing the action, and indeed may have held that the assertion of quasi in rem jurisdiction was not reasonable under the circumstances, because there was no necessity of providing the American plaintiff with a forum. *See* note 89 *infra.*

83. N.Y.L.J., Aug. 1, 1978, at 5, col. 3 (N.Y. Sup. Ct. Aug. 1, 1978).

84. 579 F.2d 194 (2d Cir. 1978). The court issued one opinion, but decided four cases at once, upholding jurisdiction based on the attachment of the defendants' insurance policies that were issued by insurance companies doing business in New York. The court by its decision

Fashions, the court seized upon dictum in *O'Connor* to deny jurisdiction.[85] It also rejected the plaintiff's argument that the plaintiff would have no other forum in which to sue the defendant if jurisdiction were denied. The plaintiff could seek redress, the court noted, in the courts of either Hong Kong or Korea.

The court in *Majique Fashions* did not reach its decision by applying an analysis that weighed the interests of the parties and of the state. At first glance, the court's denial of jurisdiction seems harsh, since it forces the plaintiff to sue the defendant in a foreign country. This result further appears to ignore the state's interest in providing an American plaintiff with an American forum.[86] But as emphasized above, application of the weighing of interests in instances of international litigation will not yield uniform results.[87] A balancing process is essential. The facts of *Majique Fashions* suggest that the plaintiff negotiated the contract in Korea, thereby indicating that it conducted business outside the United States.[88] The inconvenience to the plaintiff from having to return to Korea or Hong Kong to sue the defendant might, therefore, be minimal.[89] Correlatively, quasi in rem jurisdiction might be unreasonable if the defendant were compelled to defend the plaintiff's claim in the United States if the defendant was not doing business anywhere outside Hong Kong and Korea.[90] A valid distinction would thus exist between this case and *Feder*—in which a localized individual American plaintiff sued a foreign corporation that was doing business internationally—and quasi in rem jurisdiction based solely on the defendant's bank account would have been correctly denied in *Majique Fashions*.

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rejected the defendants' argument that *Shaffer* had overruled Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

85. The Second Circuit had said that "[i]f the plaintiffs in these cases had 'attached' the debt to defendants of a debtor only transitorily in New York, as in *Harris v. Balk,* or even bank accounts maintained by them in New York, we would readily agree that attachment jurisdiction could not be sustained when, as here, the defendants had no other 'contacts' with New York." 579 F.2d at 198.

The state court in *Majique Fashions* found this language "more consistent with the language employed in the holding of Shaffer . . . ." N.Y.L.J., Aug. 1, 1978, at 6, col. 1. The *Feder* court and the *Lime International* court looked to language in Justice Stevens' concurring opinion in *Shaffer* to uphold the same kind of jurisdiction that was denied in *Majique Fashions*. *See* Feder v. Turkish Airlines, 441 F. Supp. 1273, 1278 (S.D.N.Y. 1977); note 80 *supra*.

86. *See* notes 29-30, 58-60 *supra* and accompanying text.

87. *See* text accompanying note 65 *supra*.

88. Although the facts stated in the opinion are not explicit on this point, this assumption is drawn from language to the effect that the contract "was negotiated and performed entirely in Korea . . . ." N.Y.L.J., Aug. 1, 1978, at 5, col. 4.

89. *See* notes 53-57 *supra* and accompanying text. Although this case is an example of jurisdiction by necessity, the "necessity" for the court to provide the American plaintiff with an American forum does not prevail here because of the relatively minor inconvenience to the plaintiff in suing abroad.

90. *See* notes 53-57 *supra* and accompanying text.

IV

FOREIGN RECOGNITION AND ENFORCEMENT OF QUASI IN REM JUDGMENTS

In international litigation, American courts should keep two concerns in mind when determining whether jurisdiction based solely on the attachment of a foreign defendant's property is reasonable. First, a successful American plaintiff may ultimately wish or need to seek recognition or enforcement of his judgment in a foreign country.[91] Second, a foreign court might exercise retaliatory jurisdiction over American defendants being sued abroad if the foreign court considers the exercise of quasi in rem jurisdiction by American courts to be unreasonable.

An American plaintiff seeking recognition or enforcement in a foreign country of a quasi in rem judgment rendered by an American court may be faced with one of three unfavorable situations if the practice and procedure of the foreign country and of the United States differ. The first situation may occur when the American plaintiff has been successful in the original action because the foreign defendant either defaulted or lost on the merits but was permitted to make a limited appearance. If the plaintiff's claim was larger than the value of the defendant's property upon which jurisdiction was based, the plaintiff may wish to sue the defendant again to satisfy fully his claim against that defendant. If the subsequent suit is brought in a foreign country, the foreign court may not allow the plaintiff to sue again at all, reasoning that the plaintiff has had his day in court and that the defendant should not have to defend against the same claim twice.[92]

The second situation might arise when the foreign defendant made a limited appearance in the original action and won on the merits. A foreign country may permit the unsuccessful American plaintiff to sue the defendant again in its courts but will give collateral estoppel effect to the original action, thereby preventing the relitigation of any issues decided against the plaintiff in the first action.[93]

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91. For an explanation of the difference between the two terms "recognition" and "enforcement," see the Introductory Note to Topic 2 of Chapter 5, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 93-98 (1971).

It would be outside the scope of this Note to delve deeply into the area of recognition and enforcement of foreign judgments. The literature on the subject is voluminous. Therefore, the problems that might arise in connection with the assertion of quasi in rem jurisdiction in international litigation are posed and discussed, but no resolutions are attempted.

92. The contrary is the American rule. The plaintiff may sue again until his claim is fully satisfied, RESTATEMENT OF JUDGMENTS § 34, Comment g (1942), the only limitation being that the same property cannot again serve as the basis for attachment jurisdiction, RESTATEMENT (SECOND) OF JUDGMENTS § 75, Comment c (Tent. Draft No. 1, 1973).

93. Traditionally, the U.S. rule has been just the contrary. *See* RESTATEMENT OF JUDGMENTS § 34 (1942). *But cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 75(c) & Comment d (Tent. Draft No. 1, 1973). *See also* Casad, *supra* note 12, at 82.

The American plaintiff may face the third situation if he brings the original action in one of the jurisdictions in the United States that does not allow a defendant to enter a limited appearance but rather subjects him to full personal liability if he contests the claim on the merits.[94] In such a jurisdiction, the foreign defendant will be forced to choose between making a general appearance in order to defend his property and defaulting. It is unlikely that a foreign court will recognize or enforce any resulting deficiency judgment (the difference between the value of the property and the amount of the plaintiff's whole claim) because of the coercion exerted on the foreign defendant.[95]

The avoidance of retaliatory jurisdiction is an important concern in several respects. "Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals."[96] When exercising quasi in rem jurisdiction, an American court in international litigation "cannot confine its analysis solely to its own ideas of what is just, appropriate, and convenient. To a degree it must take into account the views of other communities concerned."[97] American courts should also consider carefully the assertion of quasi in rem jurisdiction in circumstances when they would not recognize or enforce a foreign judgment that was based on comparable jurisdiction because of the unreasonableness of such jurisdiction.[98] Quasi in rem jurisdiction in the United States has never been fully exploited relative to some of its "disingenuous uses and abuses"[99] in other countries,[100] and instances of retaliatory jurisdiction should be rare given the restriction of quasi in rem jurisdiction in *Shaffer*.[101]

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94. For example, the defendants in *Shaffer,* had jurisdiction been upheld, would have been subject to full personal liability because no limited appearance was allowed. *See* note 3 *supra*.

95. American courts will recognize a quasi in rem judgment rendered in a foreign nation's court, provided it is a valid judgment, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1971), only insofar as it purports to affect the interests in the property that was before the foreign court. *Id.* § 98, Comment d. That a deficiency judgment will be denied recognition because it lacked a proper jurisdictional base has been stated as a certainty. Nadelmann, *Jurisdictionally Improper Fora,* in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321, 328 (K. Nadelmann, A. von Mehren, & J. Hazard eds. 1961). *See also* von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach,* 81 HARV. L. REV. 1601 (1968).

96. Von Mehren & Trautman, *supra* note 13, at 1127. For some examples of such retaliation, see Nadelmann, *supra* note 95, at 330-31.

97. Von Mehren & Trautman, *supra* note 13, at 1127. *See also* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 780 (2d ed. 1976).

98. Von Mehren & Trautman, *supra* note 13, at 1126.

99. 2 A. EHRENZWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW 24 (1973).

100. *Id.* at 24-25; Nadelmann, *supra* note 95.

101. American quasi in rem jurisdiction, by definition limited to the property attached, has already been accepted as a reasonableness basis of jurisdiction. *See* A. EHRENZWEIG & E. JAYME, *supra* note 99, at 25; text accompanying note 99 *supra*.

CONCLUSION

The U.S. Supreme Court's decision in *Shaffer v. Heitner* extended the reasonableness test of *International Shoe* and its progeny to exercises of quasi in rem jurisdiction, thereby greatly restricting its use in domestic litigation. Several types of quasi in rem jurisdiction, however, have survived *Shaffer's* broad holding. One such type—quasi in rem jurisdiction by necessity—formed the focus of this Note.

A court can never presume the existence of quasi in rem jurisdiction by necessity in any action. Rather, the availability of such jurisdiction is a conclusion that is reached only after the interests of the parties and of the state are balanced in light of the fact that there is only one forum open to the plaintiff. In cases where the only possible basis for jurisdiction in the one available forum is the presence of the defendant's property, and even though the defendant has no other contacts with the forum, quasi in rem jurisdiction by necessity in certain circumstances may still be reasonable and thus reach beyond where personal jurisdiction would be constitutionally permissible.

In international litigation, the American plaintiff may have only one forum in the United States in which to assert his claim against the foreign defendant. That defendant may have no contact with the United States except for property in the forum. Again the interests of the parties, the nature and level of their activities, and the intensity of the state's interest must be weighed to determine whether jurisdiction by necessity will lie. The necessity of providing an American plaintiff with an American forum may sometimes, but not always, make it reasonable for the state to base quasi in rem jurisdiction solely on the presence of the defendant's property under the rubric of jurisdiction by necessity.

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